IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, *et al.*,
Petitioners,
v.
OMAHA INDIAN TRIBE, *et al.*,
Respondents.

No. 78-161

IOWA, *et al.*,
Petitioners,
v.
OMAHA INDIAN TRIBE, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* and BRIEF *AMICUS CURIAE* OF NATIVE AMERICAN RIGHTS FUND and ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. IN SUPPORT OF RESPONDENTS

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MOTION OF NATIVE AMERICAN RIGHTS FUND AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42 of the Supreme Court Rules, the Native American Rights Fund and the Association on American Indian Affairs, Inc. move the Court for leave to file the attached brief *amicus curiae* in support of

respondents. Petitioners State of Iowa, State Conservation Commission of the State of Iowa, Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, and Harold Jackson have given written consent to the filing of this Brief. Petitioners Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson have refused to give their consent. Respondent United States has given its written consent; respondent Omaha Tribe of Indians has refused to give its consent.

The Native American Rights Fund is a nonprofit, tax exempt law firm with its principal office in Boulder, Colorado. It is funded by private foundations, charitable contributions, and government grants. Its attorneys are engaged exclusively in representing individual Indians and Indian tribes, most of whom are financially unable to retain private counsel.

The Association on American Indian Affairs, Inc., is a nonprofit, tax exempt, membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. Its principal office is in New York City. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 20,000 comprising both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts.

The Native American Rights Fund and the Association have submitted briefs *amicus curiae* in recent Indian cases that have come before this Court, including *United States v. John*, 437 U.S. ___ (1978); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *Morton v. Ruiz*, 415 U.S. 199 (1974).

This case presents an issue of great concern to the Association, the Native American Rights Fund and the Indian people of this country—whether Indian title disputes, particularly those that involve movements of navigable waters, will be resolved in a manner that effectuates or frustrates the purposes for which Indian reservations were established. If the petitioners prevail, longstanding federal Indian policies will be severely impaired. While both the United States and the Omaha Indian Tribe have naturally tended to focus their arguments on the rather technical aspects of the immediate dispute, the attached Brief *amicus curiae* focuses on the broader ramifications of this suit. The Native American Rights Fund and the Association submit the attached Brief to assist the Court in recognizing that a decision adverse to the United States and the Omaha Indian Tribe will seriously jeopardize the fulfillment of national Indian policies.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF NATIVE AMERICAN RIGHTS FUND AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

INTEREST OF AMICI

The interest of the *amici* Native American Rights Fund and Association on American Indian Affairs, Inc., is set forth in the preceding Motion for Leave to File Brief as *Amici Curiae.*

STATEMENT OF THE CASE

The Omaha Indian Reservation established pursuant to the Treaty of March 16, 1854, 10 Stat. 1043, included 2,900 acres of land in an area known as Blackbird Bend. This land was originally located west of the Missouri River and was surveyed in 1867 by T. H. Barrett, but by 1923 the river had moved more than two miles to the west. As a result of that movement, the 2,900 acres in the original Blackbird Bend area is now located on the east side of the river. The petitioners claim that the original reservation lands washed away and that the 2,900 acres accreted to their Iowa riparian lands. The United States and the Omaha Tribe claim that they retain title to the disputed lands.

SUMMARY OF ARGUMENT

1. In *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), this Court held that state law governs the determination of title to lands affected by the movement of navigable waters in the absence of a federal interest that requires the displacement of state law. Since the nature and extent of Indian title is and always has been the exclusive province of federal law, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), it is federal law that must be applied in this case.

2. Indian lands that underlie, are adjacent to, or are in the vicinity of navigable and non-navigable bodies of water are often critically important in fulfilling the purposes for which Indian reservations were established. The application of state law could result in the loss of these lands or even in the disappearance of an entire reservation. State law gives no recognition to these matters, so its application can often undermine federal policy.

3. The effect of the movement of the Missouri River on the purposes of the Omaha Indian Reservation is the dominant consideration in determining the outcome of this case. The reservation's agricultural purpose would be substantially undermined if it is found that the 2,900 disputed acres have been eliminated from the reservation. On the other hand, upholding the petitioners' claims would result in an unjustified windfall. In these circumstances, federal law recognizes and gives effect to the Tribe's paramount interest.

4. This case can and should be resolved without reference to the burden of proof statute, 25 U.S.C. § 194, but if it is applied it should be done in a manner that gives effect to its protective purpose, resolves ambiguities in the Indians' favor, and avoids both constitutional pitfalls and a crabbed or restrictive result. Section 194 is akin to the judicially fashioned rule that legal ambiguities must be resolved in the Indians' favor and, like that rule, reflects an "eminently sound and vital" aspect of the federal obligation to protect Indian property.

I

FEDERAL LAW GOVERNS INDIAN TITLE DISPUTES

Analysis of this Court's recent decisions in *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), hereafter *Corvallis*, and *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), hereafter *Oneida*, compels the conclusion that the title dispute in this case is governed by federal law.

Corvallis held that state law, rather than federal law, determines titles to land affected by the movement of navigable waters "unless there were present some other principle of federal law requiring state law to be dis-

placed." 429 U.S. at 371. Since *Corvallis* involved a title dispute between the State of Oregon and a private landowner where no federal interest was implicated, state law was held to be controlling. The *Corvallis* opinion made it very clear that the presence of a federal interest requires the application of federal law.

In the first paragraph of the *Corvallis* opinion, the Court noted that "[t]he [Willamette] river is not an interstate boundary," 429 U.S. at 365, thereby negating one possible federal interest. *See* 429 U.S. at 375. There were several other references in the opinion to the absence of any other federal concerns that would require the application of federal law.[1] Perhaps most important for purposes of this case was the Court's discussion of *Hughes v. Washington*, 389 U.S. 290 (1967). *Hughes* applied federal law in determining the ownership of oceanfront property in the State of Washington. For this reason, two *amici* states urged the *Corvallis* Court to overrule *Hughes*. In response, the Court suggested that *Hughes* was correctly decided because of the federal interest in determining land boundaries adjacent to the international sea. 429 U.S. at 377 n.6. Thus, *Corvallis* expressly acknowledged that the presence of a federal interest requires the application of federal law.

Oneida, supra, left no doubt that determinations of Indian title are a matter of exclusively federal concern and require the application of federal law. The Court's

[1] In addition to the qualifying clause quoted in the previous paragraph, *see, e.g.*, 429 U.S. at 372 ("Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right. . . ."); and 429 U.S. at 381 ("We also think there was no other basis . . . to support the application of federal common law to override state real property law").

unanimous opinion reiterated this theme time and again in its thorough review of the decisional law spanning a period of almost 150 years:

> Once the United States was organized and the Constitution adopted, these tribal rights to Indian land became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

414 U.S. at 667. And:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13 . . . . [F]ederal law, treaties and statutes protected Indian occupancy and . . . its termination was exclusively the province of federal law.

414 U.S. at 670. In its review of the decision in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), the Court quoted the following excerpts:

> New York "possessed no power to deal with Indian rights or title . . . . The rights of the Indians to occupy those lands "do not depend on . . . any . . . statutes of the State, but upon treaties, which are the supreme law of the land; *it is to these treaties we must look to ascertain the nature of these rights, and the extent of them.*"

414 U.S. at 671 and 672, emphasis added. The emphasized portion of this quotation was repeated again at a later point in the *Oneida* opinion, 414 U.S. at 678. *Oneida* also reviewed the decision in *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), *cert. denied, sub nom. City of Salamanca v. United States*, 316 U.S. 694, in the following terms:

> [T]he Court of Appeals for the Second Circuit held that the Indian rights were federal and that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent." There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law . . . .

414 U.S. at 674. The Court also noted "that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians," and referred to "the reach and exclusivity of federal law with respect to reservation land and reservation Indians." 414 U.S. at 678.[2]

There is a close relationship between the *Corvallis* and *Oneida* decisions. *Corvallis* held that the federal origin of the states' title to the beds of navigable waters under the equal footing doctrine is not a sufficient basis to apply federal common law to the determination of land titles. "Once the equal-footing doctrine had vested title to the riverbed in [the State] as of the time of its admission to the Union, the force of that doctrine was spent." 429 U.S. at 371.

Similar reasoning and the application of the well-pleaded complaint rule had led the Second Circuit to conclude in *Oneida* that the federal courts lacked

[2]There are similar expressions elsewhere in the opinion. *See* 414 U.S. at 672 nn. 7 & 8, 677, 678, and 680 n. 15. *See also* Minnesota v. United States, 305 U.S. 382, 389 (1939) ("Indian lands under trust allotments [are] a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.").

jurisdiction over an Indian tribe's ejectment action. That court held that the tribal claim to land did not "arise under" federal law within the meaning of 28 U.S.C. § 1331. *See* 464 F.2d 916 (2d Cir. 1972). This Court reversed, concluding that the Second Circuit had erred in failing to distinguish between Indian title and ordinary private title. Federal origin of private titles is not sufficient to establish federal jurisdiction because "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 U.S. at 676. *See also* 414 U.S. at 683-684 (Rehnquist, J. concurring). By contrast, Indian property rights exist "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." 414 U.S. at 677. *Packer v. Bird*, 137 U.S. 661 (1891), and *Joy v. City of Saint Louis*, 201 U.S. 332 (1906), both of which were relied upon in *Corvallis* (*see* 429 U.S. at 377 and 380) and are cited by the petitioners and their supporting *amici* here, were distinguished as inapplicable where Indian title is at issue. 414 U.S. at 676-677. Owing to the continuing role of the federal government in protecting and supervising Indian property as well as the inapplicability of state law, the tribal ejectment action was held to present a federal question. Thus, the holding of *Oneida* was predicated on the unique and distinctive federal interest in Indian title, a matter which, under *Corvallis*, is exactly the type of federal involvement that mandates the application of federal law to determine the outcome of this case.[3]

[3]That the result of *Oneida* is in harmony with the principles applied in *Corvallis* is further shown by *Corvallis'* reliance on the following quotation from Wilcox v. Jackson, 10 U.S. (13 Pet.) 498, 517 (1839);

> We hold the true principle to be this, that whenever the question in any court, state or federal, is *whether* a title to

[footnote continued]

Given the comprehensive review of the subject in *Oneida* and this Court's emphatic and unanimous conclusion that the nature and extent of Indian property rights are and always have been the exclusive province of federal law, it would be surprising if any of this Court's prior decisions held that the nature and extent of federally protected Indian property rights are controlled by state law. The petitioners place their reliance on *Francis v. Francis*, 203 U.S. 233 (1906); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922); and *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943). The *Francis* case, *supra*, involved the meaning of a federal treaty. This Court found that the construction of that treaty by the State Supreme Court was correct as a matter of federal law. In *United States v. Oklahoma Gas & Electric Co., supra*, the federal statute at issue specifically made grants of rights of way for highways through Indian lands subject to "the laws of the State or Territory in which the lands are situated." The federal question was the degree to which this provision incorporated state highway laws. The Court looked for, but failed to find, any federal or Indian interest to be served by giving a restricted meaning to the plain words of the statute, 318 U.S. at 211, took pains

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land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation*. . . .

429 U.S. at 377, emphasis in *Corvallis*. In *Oneida* and this case the Indians and the United States have claimed that title has not passed from, and is still held by, the United States. Applying the *Corvallis-Wilcox* principles, it therefore follows that "that question must be resolved by the laws of the United States."

to limit the effect of its decision to the unique situation of the Kickapoos in Oklahoma, 318 U.S. at 215-217, and expressly left open the question of whether secretarial regulations could preempt state law, 318 U.S. at 210.

The petitioners' reliance on *Brewer-Elliott, supra*, is particularly odd. That case held that the Indians owned title to the bed of the Arkansas River which was held to be non-navigable notwithstanding the Oklahoma Supreme Court's determination of navigability. *Oklahoma v. Texas, supra*, also refused to follow another navigability decision of the Oklahoma Supreme Court, 258 U.S. at 591, and adopted the common law rule that conveyances of riparian land extend to the middle of non-navigable streams. 258 U.S. at 595-596. *See* n. 5, *infra*.

No decision of this Court known to us or cited by the petitioners has held that questions involving the nature and extent of Indian property rights must be controlled by state law in the absence of a federal statute making state law applicable.[4] *See e.g., Winters v. United States*, 207 U.S. 564 (1908), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), holding that Indian water rights are controlled exclusively by federal law; *Alaska Pacific Fisheries v.*

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[4] General federal laws that require the application of state laws include 25 U.S.C. § 231, 311, 348, 349, 357 and 398. On at least three occasions, Congress has specifically legislated to make state laws govern property disputes between Indians and non-Indians on the Omaha Reservation. Section 2 of the Act of June 27, 1894, 28 Stat. 95; Section 2 of the Act of March 26, 1898, 30 Stat. 344, 345; and Section 3 of the Act of February 28, 1899, 30 Stat. 912, 913. *See also* the Act of December 30, 1916, 39 Stat. 865. All of these laws illustrate Congress' understanding that federal consent is necessary for state laws to apply to Indian lands. *See* McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177 and n. 16 (1973).

United States, 248 U.S. 78 (1918), holding as a matter of federal law that the reservation for Indians of "the body of lands known as the Annette Islands" includes the adjacent navigable waters; *United States v. Winans*, 198 U.S. 371 (1905), holding as a matter of federal law that private riparian lands are impressed with an easement to enable Indians to gain access to their traditional fishing sites; and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 477-479 (1976), refusing to give effect to a statute, 25 U.S.C. § 349, specifically requiring the application of state law because that statute was found to be inconsistent with the policies underlying subsequent congressional enactments.

This is not to say, however, that state law always is irrelevant and must be ignored whenever Indian matters are in dispute. In applying federal law, federal courts may look to, though are not bound by, related state laws. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-107 (1972). Under some circumstances, state substantive law may be adopted as the federal rule of decision provided that it is not inconsistent with the federal interests at stake.[5]

[5] For example, Oklahoma v. Texas, *supra*, stated in *dictum* that while the federal government's intention is controlling, "if its intention be not otherwise shown, it will be taken to have assented that its conveyance [of riparian lands] should be construed and given effect in this particular according to the law of the state in which the land lies" and that this rule applied to Indian lands. 258 U.S. at 595. The holding of the case was that the government's intent in setting aside the Indian lands was clearly manifested, so that there was no occasion to resort to state law. *Id.* The Court also gave its opinion that the Oklahoma statutes relied on by the state were not applicable in any event, so no conflict of laws was shown. *Id.* at 596.

These principles were recognized and applied in *Board of County Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939). The issue was whether the United States should be able to collect interest on taxes unlawfully paid by an Indian to a political subdivision of a state. State law did not provide for the payment of interest. In denying the government's claim to interest, the Court held that "[s]ince the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas," citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). 308 U.S. at 349-350. State law was "absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy." 308 U.S. at 351-352.

To summarize, where Indian title to land is disputed, as in this case, federal law controls. Assuming, *arguendo*, that any reference to state law is appropriate under the circumstances here presented, such state law will be given recognition as the federal rule only if consistent with federal policy. It is to the federal policies involved in Indian land title disputes, therefore, to which we now turn our attention.

II

THERE IS AN OVERRIDING FEDERAL INTEREST IN DETERMINING THE OWNERSHIP OF INDIAN LANDS AFFECTED BY THE MOVEMENT OF BODIES OF WATERS

We have demonstrated that the determination of the nature and extent of Indian land title is a matter committed to federal, not state, law. The interest of the United States in protecting the Indians' ownership of their lands and in furthering federal Indian policies repeatedly has been affirmed. *See, e.g., Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473-474 and n.13 (1976), and cases therein cited and discussed; *United States v. Minnesota*, 270 U.S. 181, 193-195 (1926); and *McKay v. Kalyton*, 204 U.S. 458, 469 (1907). But the petitioners and their supporting *amici* appear to argue that the general interest of the United States in protecting Indian lands is not a sufficient basis upon which to predicate the application of federal law in this case. They contend that federal law has no real or basic connection to this controversy and that, from the standpoint of the federal government, it does not matter how the law of accretion, avulsion, and the like, is applied. *Amici* California, et al., even go so far as to suggest that the federal interest in protecting Indian rights would be furthered by the application of state law. *Amicus Curiae* Brief of California, et al., at 28-33.[6]

[6] *Amici* California, et al., argue that the issue here is simply a choice among otherwise neutral laws of real property. That this is not true is illustrated by the prior cases reaching this Court. States have an inducement to favor rules which enhance their rights in the beds and former beds of streams. In *Bonelli, infra*, Arizona claimed the land at issue based on the land's former status as streambed. In *Corvallis, supra*, Oregon claimed the land as present

[footnote continued]

While we believe that the historic and continuing federal interest in protecting Indian lands, taken by itself, is a sufficient basis on which to predicate the application of federal law, we shall now show that the content of the rules for determining the ownership of lands that are arguably Indian and have been affected by the movement of waters is a matter of direct and substantial federal concern and therefore must be governed by federal law.

Numerous decisions have recognized the importance of the location of Indian lands in relation to adjacent waterways. Indeed, since the primary purposes for the establishment of many Indian reservations include the Indians' pursuit of irrigated agriculture and traditional hunting, fishing and related activities, *see, e.g., Winters v. United States*, 207 U.S. 564 (1908), and *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968), the Indians' ownership of lands adjacent to and in the vicinity of rivers, lakes, streams, tidal waters, oceans, etc., surely ranks in the forefront of federal concerns.[7]

streambed, impairing a former patent. In Hughes v. Washington, *supra*, the state claimed littoral land that had been ocean bed, cutting off a riparian owner. In Oklahoma v. Texas, *supra*, and Brewer-Elliott Oil Co., *supra*, in pursuit of its claim Oklahoma advocated both navigability of the Red River and severance of the streambed from the upland by state legislation.

These cases illustrate that the states are more than neutral arbiters; they have direct financial and proprietary interests in formulating and applying rules that will tend to make them the winners in these controversies. *See Corvallis, supra*, 429 U.S. at 393 (Marshall, J. dissenting, quoting the Solicitor General's Brief in Hughes v. Washington, *supra*). One of the fundamental purposes of federal guardianship has always been to protect a "dependent people" from their more numerous and antagonistic white neighbors and from the state and local governments that reflect the same hostility. United States v. Kagama, 118 U.S. 375, 384-385 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-561 (1832).

[7] Where, as in this case, a body of water marks the boundary of an Indian reservation, there is an additional reason for applying

[footnote continued]

Thus, for example, in the seminal Indian water rights case, *Winters v. United States*, *supra*, the fact that the Milk River formed the boundary of the Fort Belknap Indian Reservation was considered especially significant. The court of appeals commented: "Why was the northern boundary of the reservation located 'in the middle of Milk river' unless it was for the purpose of reserving the right to the Indians to the use of said water for irrigation, as well as for other purposes?" 143 Fed. 740, 745 (9th Cir. 1906). If state law is held to govern title to Indian lands affected by the movement of streams and rivers, the Indians could be cut off from access to the waters that were intended to be the source of essential irrigation supplies, thereby making it difficult or impossible to fulfill one of the most essential purposes of the reservation. Applying principles of state law uninfluenced by federal considerations could have the effect of eliminating a significant portion, or even all, of the irrigable acreage within a reservation.[8] Indeed, an entire reservation could disappear or be washed away.

With regard to fishing, *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827, cited with approval in *Choctaw Nation v. Oklahoma*, 397

federal law. Indian tribes are sovereign entities. The boundaries of their reservations are therefore considered political boundaries akin to dividing lines between states. Federal law governs interstate boundaries and is also the source for determinations of reservation boundaries. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 n. 8 (1970).

[8] For example, this case involves title to 2,900 acres of land which is more than six times the amount of irrigable acreage within the Cocopah Reservation located along the banks of the Colorado River in the State of Arizona. *See* Arizona v. California, 373 U.S. 546, 594-601 (1963), *decree*, 376 U.S. 340, 344 (1964). The Chemeheuvi Reservation on the California side of the Colorado was adjudicated water rights for only 1,900 irrigable acres. *Id.*

U.S. 620, 633 (1970), follows *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and holds that the Quillayute Indian Reservation includes the Quillehute River and its tidal waters because of the Indians' dependence on their abundant fishery resources. *See also Donnelly v. United States*, 228 U.S. 243, 259 (1913). If the petitioners' position is accepted, the results for these and similarly situated reservations could be disastrous. If a river were to move to a new location, state law might operate to divest the tribe of its title in favor of the state. *See Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). Or the state might claim ownership of lands formed by accretion immediately adjacent to a river (or tidal waters) and then prevent the Indians from gaining access to a river or from utilizing those lands for essential fishery related purposes. *See Hughes v. Washington*, 389 U.S. 290 (1967). Or the movement of a river and the application of state law might result in the creation of privately owned lands between the river and the upland portion of a reservation with the same devastating consequences. These considerations demonstrate the overriding and overwhelming federal interest in the determination of ownership of lands claimed by Indians and affected by the movement of navigable waters. *Compare Corvallis*, *supra*, 429 U.S. at 377 n. 6.[9]

[9] The federal interest in the ownership of lands affected by the movements of waters is underscored by 18 U.S.C. § 1165 which makes it a crime to hunt, trap, or fish on Indian lands without lawful authority. The statute requires the government to prove Indian ownership of the land where the alleged offense takes place as an essential element of the crime. *See* United States v. Finch, 548 F.2d 822, 827 (9th Cir. 1976), *reversed on other grounds sub nom.* Finch v. United States, 433 U.S. 676 (1977). The lands most frequently involved in such prosecutions are riparian to, or underlie, bodies of water. *Id.*

Further, the automatic application of state law would not leave any room for consideration of the traditional rules for construing the effect of the treaties and statutes establishing Indian reservations. We have in mind such familiar, often-expressed principles that the extinguishment of Indian title requires federal consent, *Oneida, supra*; that the extinguishment of Indian rights is not to be lightly implied, *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934); that ambiguities must be resolved in favor of the Indians, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); that treaties must be interpreted as the Indians would have understood them, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); that "the terms of the treaty are carried out . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people," *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); and, most importantly for purposes of this case, that special Indian rights, privileges and immunities will be implied to the extent necessary to fulfill the purposes of the reservations and federal Indian policies, *Arizona v. California*, 373 U.S. 546, 594-601 (1963); *Squire v. Capoeman*, 351 U.S. 1, 9 and 10 (1956); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371, 381 (1905); and *United States v. Rickert*, 188 U.S. 432, 437-438, 442 and 443-444 (1903).

Having shown the concrete interest of the federal government in the outcome of disputes involving title to Indian lands adjacent to or underlying bodies of water, we shall now proceed to show how federal policies will be implemented through the application of federal law in this case.

III

FULFILLING THE PURPOSES OF THE OMAHA RESERVATION AS WELL AS OTHER CONSIDERATIONS REQUIRE THAT THE TITLE DISPUTE BE RESOLVED IN THE INDIANS' FAVOR

As explained in the previous section, rigid application of accretion or avulsion principles without regard to federal interests could destroy an entire reservation, or remove all of a reservation's irrigable acres or eliminate a reservation's riparian access that is essential to the fulfillment of its purposes. Therefore, the effect of a channel shift on the purposes of the Omaha Reservation must be the dominant consideration in determining the outcome of this case.

In the 1854 Treaty, the Omahas ceded most of their aboriginal territory to the United States and tentatively set aside part of their domain as their reservation. The treaty provided, however, that the Tribe could reject that area in favor of another, "not to exceed 300,000 acres." Art. 1 of the Treaty, 10 Stat. 1043. The lands reserved in the 1854 treaty were found unsuitable and an alternate tract of 300,000 acres, which included the Barrett Survey area, was permanently set aside. *See United States v. Omaha Tribe of Indians*, 253 U.S. 275 (1920). That land, as modified by subsequent treaties and statutes,[10] has remained the Omahas' home.

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[10] By the Treaty of March 6, 1865, 14 Stat. 667, the Omahas ceded a tract on the north side of their reservation for the settlement of the Winnebago Tribe. The Act of June 22, 1874, 18 Stat. 146, 170, authorized the purchase of 20 sections of land from the Omahas for the location of the Wisconsin Winnebagos. The Act of August 7, 1882, 22 Stat. 341, superseded the Act of June 10, 1872, 17 Stat. 391, and authorized the sale, with the Omahas' consent, of reservation lands lying west of a right of way previously

[footnote continued]

The 1854 Treaty itself, the subsequent Treaty of 1865, and other legislative enactments clearly establish that the predominant purpose of the Reservation was to supply farmland so that the Omahas would be able to support themselves on a vastly reduced domain by agriculture instead of nomadic hunting. *Cf., Winters v. United States*, 207 U.S. 564 (1908).[11] Article 4 of the 1854 Treaty, *supra*, authorized the use of the annuities to be paid to the Omahas for, *inter alia*, "opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, ..." Article 4 of the 1865 Treaty, *supra*, states that "the Omaha Indians [are] desirous of promoting settled habits of industry and enterprise amongst themselves," and want to assign limited quantities of their land in severalty to their members "to be cultivated and improved for their own individual use . . . ." The Act of May 15, 1888 for the relief of the Omaha Tribe of Indians in Nebraska, 25 Stat. 150, appropriated $70,000

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granted to a railroad. *See also* the Act of March 3, 1885, 23 Stat. 362, 370.

Significantly, at one time Congress authorized the sale of "surplus," unallotted Omaha lands, but that program was never implemented. *See* the Act of May 11, 1912, 37 Stat. 111, as amended by the Act of January 7, 1925, 43 Stat. 726. Section 5 of the latter statute provided that the disposal of the unallotted lands of the Omaha Reservation "shall not become operative so long as the need thereof exists of maintaining an agency and school for the Omaha Tribe of Indians residing on the Omaha Indian Reservation in the State of Nebraska." After the Omahas were organized under a constitution pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, the sale of tribal lands could not be undertaken absent tribal consent. 25 U.S.C. § 476. *See also* 25 U.S.C. § 463(a).

[11] The Omahas ceded approximately 5,000,000 acres to the United States in the 1854 Treaty. *See* Omaha Tribe of Indians v. United States, 53 Ct.Cl. 549 (1918), *affirmed in part and reversed in part sub nom.* United States v. Omaha Tribe of Indians, *supra*.

"to enable said tribe to further improve their condition by making improvements upon their homesteads by the purchase of stock, cattle, agricultural implements, and other necessary articles . . . ." And the Act of February 18, 1909, 35 Stat. 628, authorized payments from the Omaha Tribe's funds for the protection of tribal lands from overflow and for reclaiming tribal lands. The history of the reservation, *see* note 10, *supra*, also shows that from time to time Congress has given consideration to the amount of land needed by the Omahas and has enacted specific laws authorizing the sale of tribal lands (with the Omahas' consent) when it was felt that such sales would not interfere with the purposes of the reservation. And, as previously noted, Congress did authorize the sale of "surplus" unallotted Omaha lands, but that program was suspended and has never been implemented.

Awarding the 2,900 acres of the disputed agricultural lands to the petitioners would constitute a significant infringement of the Omaha Reservation's foremost purpose. This Court's prior decisions establish that the rights of non-Indian property owners must be subordinated to the extent necessary to carry out the purposes of Indian reservations.

In *Winters v. United States*, 207 U.S. 564 (1908), the Court found that an implied reservation of the waters of the Milk River was necessary to make the Fort Belknap Reservation productive. The Court expressly recognized that competing non-Indian landowners along the Milk River also had great need for the same water, 207 U.S. at 576, but held that the Indian claim must predominate. *Accord: Arizona v. California*, 373 U.S. 546, 599-601 (1963).

In *United States v. Winans*, 198 U.S. 371 (1905), the tribes had reserved the right to fish at their "usual and

accustomed places" outside of the lands reserved for their residence. The United States had patented riparian lands to private parties, and the grantees had obtained a license from the state to erect a fishing wheel on the stream. The wheel precluded Indian fishing at a usual and accustomed place, and the private claim to the land was set up to preclude Indian access to the stream. This Court held that the treaty right required both removal of the fishing wheel and an implied easement of access for the Indians across the private lands. The hardship to the private party was subordinated to the treaty right. "No other conclusion would give effect to the treaty." 198 U.S. at 381. *See also Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), holding that notwithstanding the equal footing doctrine, title to the beds of navigable water was vested in Indian tribes.[12]

This analysis is reinforced by two additional considerations. First, as noted in Part I *supra*, it is a fundamental maxim of Indian law that the termination of Indian title requires the consent of the United States. *Oneida, supra*; 25 U.S.C. § 177. Congress never has extinguished the right of the Omaha Tribe to the 2,900 acres that are

[12]The theory of these cases is comparable to the judicially created navigational servitude. Under that doctrine, the federal government has the power to appropriate private interests in water courses in order to carry out federal objectives on navigable waterways. *See* Bonnelli Cattle Co. v. Arizona, 414 U.S. 313, 329 and 331 (1973); United States v. Rands, 389 U.S. 121 (1967); United States v. Virginia Electric and Power Co., 365 U.S. 624, 627-628 (1961); and United States v. Commodore Park, 324 U.S. 368, 390 (1945). Both the Indian and the navigation cases hold that achieving the federal objective is the paramount consideration and that private interests must be subordinated to the extent necessary to accomplish that objective.

disputed in this case; nor has Congress ever provided that title to Indian lands could be lost as a result of accretion or avulsion or any other movement of a body of water. *See United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, and *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938), holding that the Nonintercourse Act, 25 U.S.C. § 177, precludes loss of Indian lands as a result of laches, estoppel, adverse possession and the like. *See Board of County Commissioners of Jackson County v. United States, supra*, 308 U.S. at 350-351. The petitioners' claim must therefore be predicated on one of two fictions: either federal consent to the extinguishment of tribal title by accretion or avulsion is implied in making the Missouri River one of the reservation's boundaries, or the tribal lands "disappeared" when their top soil eroded away and the "new land" that subsequently appeared in its place was never afforded the protection of the Nonintercourse Act.

Second, in this case the petitioners are claiming the 2,900 acres as accretions. These lands were not patented to them; they were simply entered by the petitioners or their predecessors. While the Tribe stands to lose a significant amount of agricultural land from its reservation, the petitioners are after a windfall.

Federal law takes account of all of these factors. *Bonnelli Cattle Co. v. Arizona, supra*, teaches that doctrines such as accretion, avulsion and reemergence are applied in light of their rationales (as opposed to their technical definitions) and the nature of the federal, state and private interests at stake. 414 U.S. at 328-330.[13]

[13]*Corvallis, supra*, overruled the *Bonnelli* holding that title disputes between states and private landowners are governed by

[footnote continued]

For example, in *Bonnelli* the Court determined that no public purpose related to the navigational servitude was served by state ownership of the former riverbed (414 U.S. at 322-323), that state ownership of both the new riverbed and the old riverbed would constitute an unjustified windfall (414 U.S. at 328), and that it would be unfair to deprive a private owner of riparian land originally included within his grant (414 U.S. at 329-330). For these reasons, the rechanneling of the Colorado River by the federal government was held to constitute an accretion.[14] "The rationale for the application of the doctrine of avulsion is not applicable to this dispute because of the limited interests of the State in the subject property." 414 U.S. at 328. The Court specifically left open the possibility that a rechannelization project could be treated as an avulsion under different circumstances. 414 U.S. at 330 n.27.

In this case, the paramount consideration is the federal interest in preserving 2,900 acres of agricultural land within the Omaha Indian Reservation.[15] This interest will be served either by treating the movement of the Missouri River as an avulsion or through the doctrine of

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federal law. *Bonnelli*'s conceptualization and application of the principles of federal law were not disturbed in *Corvallis* and remain valid precedent.

[14] Alternatively, the Court reached the same result through application of the reemergence doctrine. *See* p. 23, *infra*.

[15] The only claim of the petitioners that may be entitled to some consideration is the possible loss of their riparianness, but their right of access may be protected by federal law. *See* Confederated Salish & Kootenai Tribes v. Namen, 380 F.Supp. 452 (D.Mont. 1974), *affirmed*, 534 F.2d 1376 (9th Cir. 1976), *cert. denied*, 429 U.S. 929. There is no indication, however, that the petitioners have suffered any real loss to their lands to which the 2,900 acres in dispute have allegedly accreted.

reemergence. The concept of reemergence was accepted and applied in *Bonnelli, supra*. Under that doctrine,

> . . . when identifiable riparian land, once lost by erosion, subsequently reemerges as a result of perceptible change in the river course, title to the surfaced land revests in its former owner.

Bonnelli, supra, 414 U.S. at 330 n.27, citing *Arkansas v. Tennessee*, 246 U.S. 158, 174-175 (1918), which states:

> [W]here the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification.

Everyone agrees that the 2,900 disputed acres were once riparian, that they were covered with water and eroded, and that they subsequently reemerged on the opposite side of the Missouri River as a result of a change in the river's course. The reemergence doctrine should be applied in these circumstances to give effect to the purposes of the Omaha Indian Reservation, to prevent the extinguishment of Indian title without federal consent, and to avoid a windfall to the petitioners. *Winters v. United States, supra*; *United States v. Winans, supra*.[16]

Alternatively, and at the very least, the parties seeking to invade the Reservation's purpose by severing its farmland must bear the burden of showing both that federal law supports their position and that the facts supporting their claim are established by a preponderance

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[16] The case for applying the federal law of reemergence in order to effectuate the purpose of the Omaha Reservation is stronger than either *Winters* or *Winans*, which did not involve any windfalls to the non-Indian claimants.

of the evidence. *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). Failing both, the court of appeals properly held for the Tribe.

IV

SECTION 194 PLACES THE BURDEN OF PROOF ON THE NON-INDIAN CLAIMANTS

As demonstrated in Part III, *supra*, the judgment of the court of appeals should be affirmed without regard to the burden of proof statute, 25 U.S.C. § 194. The following observations are offered in the event the Court should reach the Section 194 issues that are tendered in the petitions under review.

1. The term "white person," as used in the statute, must be held to mean "non-Indian." If the statute were applied to white people, but not to black people, orientals or corporations, serious constitutional problems would be encountered since there is no rational basis for these distinctions. *Strauder v. West Virginia*, 100 U.S. 303 (1880).[17] "[A]n act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril." *Chippewa Indians v. United States*, 301 U.S. 358 (1937).[18]

[17] As noted, *infra* at 25, there may have been a rational basis in 1822 and 1834 to exclude slaves, but that justification obviously is no longer valid.

[18] When Section 194 was enacted in 1822 and reenacted in 1834, the terms "person" and "white person" were synonymous so far as federal law and the Constitution were concerned. Scott v. Sandford, 60 U.S. (19 How.) 373 (1857). Since that is no longer true, the statute must be deemed to have been modified accordingly.

2. "White person" must also be interpreted in the context of the Indian Trade and Intercourse Acts of 1802 and 1834, of which Section 194 was a part.[19] It is apparent that Congress used the term "person" in various sections of these acts without any comprehensive attempt at uniform application, so that the intent of each section must be gathered from its purpose and context. In the original version of the 1802 Act, Sections 3 through 10 referred to any "citizen or other person" and Section 19 to any "person or persons." Despite these comprehensive words, it is virtually certain from the purpose and context that "person" in these sections did not include Indians. Conversely, "any person" in Sections 12 and 17 likely included Indians.

A number of these sections referred to "citizens," a term which was then confined to white persons. *Scott v. Sandford, supra.* Today the term includes both Indians and other nonwhite persons. Thus "white persons" in 1822 and 1834 could have been intended to refer to all citizens plus alien whites. To put the matter another way, the intent was to use a term which excluded slaves and Indians. So read, the term is properly equated to all persons today.

The 1834 Act introduced the phrase "any person other than an Indian" in Sections 4, 7 and 8. But a number of other provisions used the unqualified term "person" in a context which indicated that it was unlikely that Indians were included. *See* Sections 2, 3, 9, 10, 11, 13, 14, 15, 17 and 23. Other sections used "person" in a context that probably included Indians. *See* Section 12, 20, 21, 26. Again, no uniform meaning can be deduced, and one must look to the context and purpose of each section.

[19] Section 194 was first enacted in 1822 as an amendment to the 1802 Act, 2 Stat. 139.

The 1834 Act also added a second section referring to "white person"—Section 16 providing for recompense to Indians injured by lawbreakers. In *United States v. Perryman*, 100 U.S. 235 (1879), the Court held that this section excluded an offender who was black. The Court recognized that the likely intent in 1834 was to exclude fugitive slaves from the statute, but we think the Court failed to give proper effect to the abolition of slavery.

3. So far as the application of the statute to the State of Iowa is concerned, it is important to note that Iowa does not claim that its ownership of any of the disputed lands is related to any of the purposes served by the equal footing doctrine or the navigational servitude. *Compare Bonnelli, supra.* Thus, this case does not present the question of whether Section 194 should be applied in such circumstances. *But see Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

4. Petitioners argue that changes from "Indians" in the 1822 Act to "Indian" in the 1834 Act require that Indian tribes be excluded from the latter by intended amendment. No such conclusion is justified. The 1822 Act used Indians and white persons first in the plural, then in the singular. The 1834 Act used both terms twice in the singular. The most likely explanation is a redrafter's desire to improve the syntax of the 1822 version, which was somewhat awkward.

It is well established, now as a statutory rule, that singular words may be read in the plural and *vice versa* according to the context and purpose of the statute. 1 U.S.C. § 1. Therefore, petitioners' argument demands some rational connection to the context and purpose in 1834 as distinct from 1822. None is apparent.

Petitioners argue that the change in the Nonintercourse Act (prohibiting the unauthorized sale of Indian lands) from the 1802 version protecting both Indians and tribes to the 1834 enactment which protected only tribes bears on the interpretation of Section 194. There is no logic to this contention. The Nonintercourse Act requires lawful federal authority to validate a conveyance from Indian tribes. Thus, in a lawsuit, the Nonintercourse Act bears on legal issues. Section 194 deals with questions of fact. The 1834 change in the Nonintercourse Act thus has no logical relation to Section 194.

5. In any event, the petitioners' purported distinction between individual Indians and Indian tribes does not make any sense. If the applicability of Section 194 were limited to claims of individual Indians, tribes could assign the disputed land (or the cause of action for its recovery) to individual members. *See* F. Cohen, *Handbook of Federal Indian Law* 188-189 (1942). And once the land has been assigned to an individual tribal member, either the Tribe or the United States could sue on his behalf. 25 U.S.C. §175; *Puyallup Tribe v. Department of Game,* 433 U.S. 165, 169-173 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-474 (1976); *Heckman v. United States*, 224 U.S. 413 (1912). So far as non-Indian claimants are concerned, the results would be the same, while requiring the charade of a land transfer would not be in keeping with contemporary Indian policy. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 n.11 (1976). *See Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976).

6. From the beginning of this Nation's history, this Court has developed special rules for applying and interpreting Indian treaties and statutes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 533-554 (1832). The

rule that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians" has recently been described as an "eminently sound and vital canon" of construction. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). *See also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-631 (1970), applying that rule to a treaty in a dispute with a state over title to the bed of a navigable waterway.

Section 194 is akin to this judicially developed canon and no doubt was motivated by the same concerns. Just as those opposing Indian claims are required to demonstrate that the law unambiguously supports their position, Section 194 imposes a similar burden on the factual side. It is significant that Congress saw fit to enact a rule imposing the burden of proof in Indian property rights disputes. Otherwise, the burden might have depended upon the luck of the draw: who happened to be in possession and who initiated the lawsuit. Indeed, in the absence of Section 194, aggressive non-Indians would have had an incentive to dispossess Indians from their lands in order to compel the Indians to sue, and then hide behind the traditional rules allocating the burden of proof and the insurmountable difficulties that "uncivilized" Indians unfamiliar with English would experience in proving their cases. For these "eminently sound and vital" reasons, non-Indians should bear the burden of proof in such cases even in the absence of Section 194. This Court certainly would be justified in fashioning such a rule to carry out federal Indian policy just as it has consistently resolved legal ambiguities in the Indians' favor.[20]

[20]The petitioners and their supporting *amici* contend that the Eighth Circuit's application of Section 194 could have a

[footnote continued]

7. To the extent that there are any ambiguities in Section 194, they must be resolved in favor of the Indians and in a manner that effectuates its protectionist purpose. *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Smith v. McCullough*, 270 U.S. 456, 463-465 (1926). Here, as in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 176 (1973), there is "no reason to give [the] language [of the Indian statute] an especially crabbed or restrictive meaning."

devastating impact on land titles throughout the United States. It is hard to take this assertion too seriously, however, since the statute has been on the books since 1822 and this is the first time that this Court has been called upon to define its proper scope. If the petitioners and their *amici* were correct, one would certainly have expected to find the statute invoked much more frequently, especially in such a heavily litigated area. *See, e.g., Oneida, supra*, 414 U.S. at 699 and n. 5.

Actually, the critical factor in resolving virtually all Indian property rights litigation has been the canon requiring resolution of legal ambiguities in the Indians' favor, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Winters v. United States, 207 U.S. 564, 576-577 (1908); and Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1976), and the Court has just reaffirmed the continuing validity of this rule. State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, ___ U.S. ___, 47 U.S.L.W. 4111, 4117 (1979).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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February, 1979

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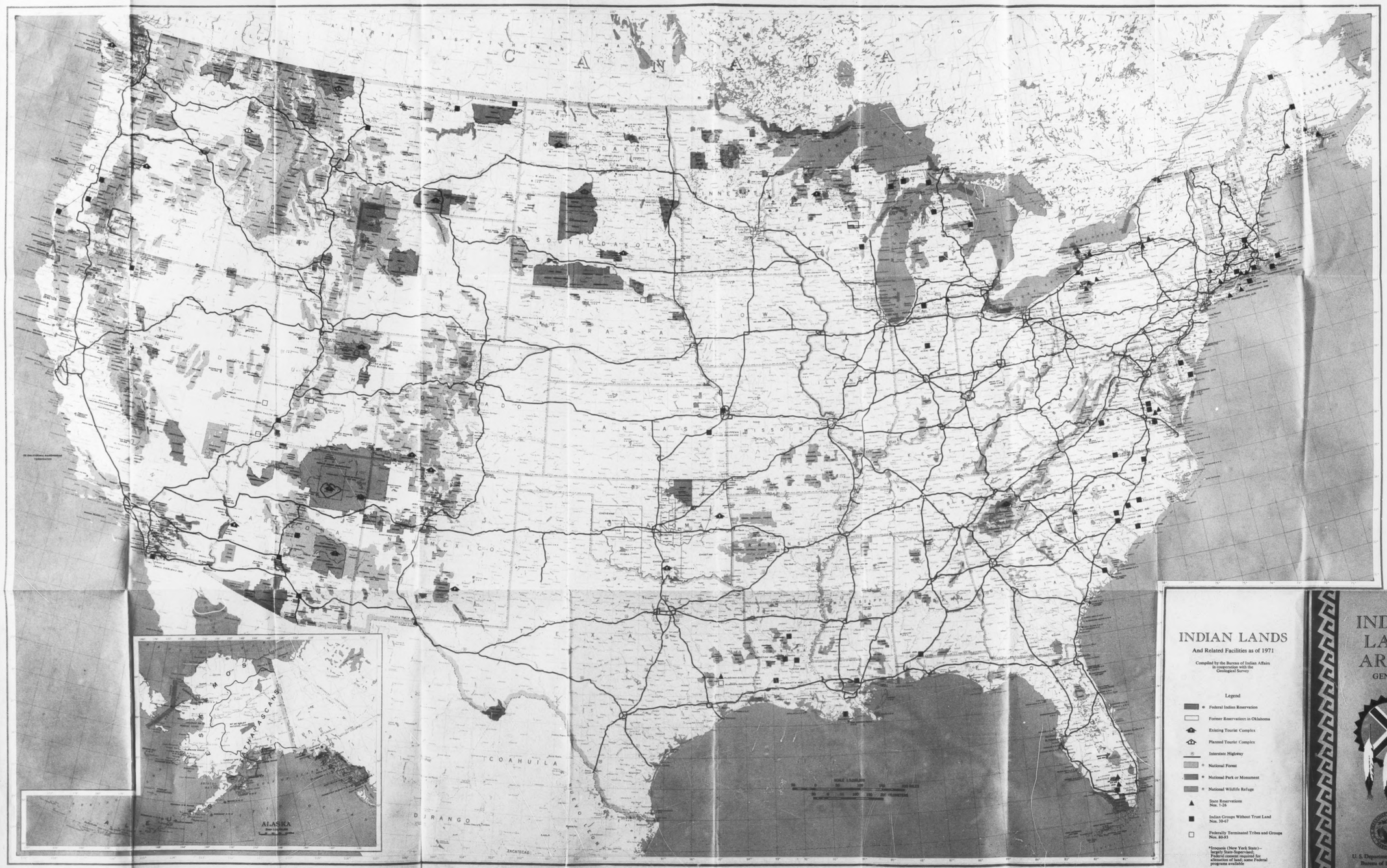

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Wewoka, Oklahoma 74884

OREGON

(10) Umatilla Agency
Pendleton, Oregon 97801

(10) Warm Springs Agency
Warm Springs, Oregon 97761

SOUTH DAKOTA

(1) Cheyenne River Agency
Eagle Butte, South Dakota 57625

(1) Crow Creek Agency
P.O. Box 616
Fort Thompson, South Dakota 57339

(1) Flandreau School
Flandreau, South Dakota 57028

(1) Lower Brule Agency
Lower Brule, South Dakota 57548

(1) Pine Ridge Agency
Pine Ridge, South Dakota 57770

(1) Rosebud Agency
Rosebud, South Dakota 57570

(1) Sisseton Agency
Sisseton, South Dakota 57262

(1) Yankton Agency
Wagner, South Dakota 57380

UTAH

(9) Uintah and Ouray Agency
Fort Duchesne, Utah 84026

WASHINGTON

(10) Colville Agency
Nespelem, Washington 9915

(10) Spokane Agency
Wellpinit, Washington 9906

(10) Western Washington Agency
3006 Colby Avenue
Everett, Washington 98201

(10) Yakima Agency
Toppenish, Washington 9894

WISCONSIN

(6) Great Lakes Agency
Ashland, Wisconsin 54806

WYOMING

(4) Wind River Agency
Fort Washakie, Wyoming 82514